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MICHAEL RODAK, JR., CLE

No. 77-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT CBS INC. IN OPPOSITION

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
STEPHEN A. WEISWASSER
JOHN F. COONEY

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent CBS Inc.

Of Counsel:

RALPH E. GOLDBERG
ALLEN Y. SHAKLAN
CBS Inc.
51 West 52 Street
New York, New York 10019

May 10, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-45a) is reported at 567 F.2d 1095. The opinion of the Federal Communications Commission is reported at 48 F.C.C.2d 1 (Pet. App. B, pp. 46a-77a), and its opinion on reconsideration is reported at 58 F.C.C.2d 691 (Pet. App. C, pp. 78a-101a).

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977.[1] The petition for a writ of certiorari was filed on February 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Federal Communications Commission's fairness doctrine requires a broadcaster to assure that its audience is given an opportunity to hear contrasting views on controversial issues of public importance. This case involves the application of that doctrine to broadcast commercials. The question presented is whether the Commission violated the First Amendment or the public interest standard of the Communications Act, or acted arbitrarily and capriciously, in determining that ordinary product and service advertisements should be treated in the same manner as all other forms of broadcast material for purposes of application of the fairness doctrine.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides, in pertinent part:

> Nothing in the foregoing . . . shall be construed as relieving broadcasters . . . from the obligation im-

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[1] The Petition fails to include in the appendix a copy of the judgment of the court of appeals sought to be reviewed, as required by Rule 23(j) of the Rules of this Court.

posed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT

This case involves the application of the fairness doctrine to the broadcast of ordinary product and service advertisements—that is, advertisements which are limited to promoting the sale of a product or service.

In 1971, the Federal Communications Commission (the "Commission") undertook its first full-scale review in over twenty years of the efficacy of the fairness doctrine and related policies.[2] Among the issues specifically set for consideration in that proceeding was whether fairness doctrine reply obligations should continue to attach to broadcasts of ordinary product and service advertisements.[3]

The advertising aspect of the inquiry was prompted by the Commission's experience over several years with the consequences of its 1967 *Banzhaf* decision.[4] In *Banzhaf*, the Commission had found that advertisements promoting the sale of cigarettes constituted advocacy of one side of a controversial issue of public importance as to the desirability of cigarette smoking. It therefore had held that such advertisements gave rise to a fairness doctrine obligation to broadcast the opposing point of view. The Commission

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[2] *Notice of Inquiry*, 30 F.C.C.2d 26 (1972). The Commission first issued a comprehensive formulation of the fairness doctrine in 1949. *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949).

[3] 30 F.C.C.2d at 26.

[4] *WCBS-TV*, 8 F.C.C.2d 381, *reconsideration denied*, 9 F.C.C.2d 921 (1967), *aff'd*, *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 405 F.2d 1082 (1968), *cert. denied sub nom. Tobacco Institute* v. *FCC*, 396 U.S. 842 (1969) (*"Banzhaf"*).

originally considered that its cigarette ruling was unique and established no rule of general applicability, and the court of appeals affirmed upon similar assumptions as to its uniqueness. *See Banzhaf, supra*, 405 F.2d at 1097 n.63. But the court of appeals subsequently held that the *Banzhaf* principle could not logically be so limited but must—"pending . . . a reformulation" of the doctrine [5]—extend to other advertisements promoting products and services whose use in society could be said to be controversial.[6]

The Commission recognized that once the line it sought to draw with cigarette advertising was breached, the potential scope of the *Banzhaf* principle was vast. In its *Notice of Inquiry*, the Commission stated (30 F.C.C.2d at 31) that

> almost without exception, product commercials can be argued to raise some significant controversial issue—and as public awareness grows, so, too, does the occasion for making such arguments.

And, in applying *Banzhaf*, the Commission and the courts had experienced great practical difficulties in defining the issues "implicitly" raised by commercials which expressly did nothing more than promote the sale of a product or service.[7]

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[5] *Friends of the Earth* v. *FCC*, 146 U.S. App. D.C. 88, 449 F.2d 1164, 1170 (1971).

[6] *Compare Friends of the Earth* v. *FCC, supra* (fairness doctrine, as defined in *Banzhaf*, applied to ordinary advertisements for large automobiles and leaded gasoline) *and Retail Store Employees Union* v. *FCC*, 141 U.S. App. D.C. 94, 436 F.2d 248 (1970) (product advertisement by store involved in a labor dispute implicitly raised the controversial issue of continued patronage) *with Green* v. *FCC*, 144 U.S. App. D.C. 353, 447 F.2d 323 (1971) (armed forces recruitment commercials did not implicitly raise the controversial issue of the desirability of military service).

[7] *See, e.g., Friends of the Earth* v. *FCC, supra*, 449 F.2d at 1169-70; *cf. Green* v. *FCC, supra*, 447 F.2d at 329-32.

In 1974, the Commission issued its *Fairness Report* in which it overruled its prior decision in *Banzhaf* and announced that henceforth ordinary product and service advertisements would not be found to fall within the scope of the fairness doctrine.[8] That *Report* and its reaffirmation in the Commission's 1976 decision on reconsideration[9] are the subjects of the decision below and the instant Petition.

The Commission's decision with respect to product and service advertisements followed from its analysis of the scope and overall operation of the fairness doctrine. As a general matter, the *Fairness Report* reaffirmed the Commission's traditional policy that the fairness doctrine should apply only to issues that "have a significant impact on society or its institutions" and that are the "subject of vigorous debate" in the community.[10] It also reaffirmed the Commission's general view that not all statements which purportedly bear some relationship to an ongoing public debate should trigger application of the fairness doctrine, but only those which directly present views on one side of a controversial issue. The Commission concluded that in determining whether the doctrine has been triggered by broadcast material, the analysis

> should focus not on whether the statement bears some tangential relevance to the . . . question, but rather on whether that statement, in the context of the ongoing community debate, is so *obviously and substantially related to the . . . issue as to amount to advocacy of a position* on that question (Pet. App. B, p. 58a) (emphasis added).

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[8] *In re The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act* (Docket No. 19260), *Fairness Report*, 48 F.C.C.2d 1, 22-28 (1974) (the "*Fairness Report*") (Pet. App. B, pp. 67a-73a).

[9] *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 F.C.C.2d 691, 697-99 (1976) (Pet. App. C, pp. 84a-86a).

[10] Pet. App. B, p. 57a.

The Commission acknowledged that this test excludes from the scope of the fairness doctrine statements which might be thought by some obliquely or implicitly to touch upon a controversial issue of public importance (*id.*). But it concluded that the journalistic interest of the broadcasters, and the public's interest in robust discussion of controversial issues, would be better served by such a standard than by a broader rule of relevance which would require close inspection of the content of broadcasts on an inference-by-inference basis, "with constant Governmental intervention to try to implement the policy . . ." (*id.*).

Applying those general standards to ordinary product and service advertisements, the Commission recognized a difference between advertisements which "actually consist of direct and substantial commentary on important public issues" (*id.*, p. 67a), and advertisements which simply promote public consumption of a product or service, without discussion of the public issues which might be related to their purchase or use.[11] The Commission concluded that the first category of advertisements containing overt commentary on issues, "could . . . make a meaningful contribution to the public debate" (*id.*). It therefore held that such overt advertisements would continue to be subject to the fairness doctrine (*id.*, p. 63a).[12]

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[11] The Commission also recognized a third category of commercials, those which arguably make false and misleading claims. The Commission concluded that the proper remedy for such deception was provided by existing Federal Trade Commission sanctions against false advertising, rather than by creation of a right of reply under the fairness doctrine (*id.*, pp. 72a-73a). The District of Columbia Circuit reached the same conclusion in a decision issued shortly before the release of the *Fairness Report*. *See Neckritz* v. *FCC*, 163 U.S. App. D.C. 409, 502 F.2d 411 (1974).

[12] The Commission noted that some advertisements—such as those which attempt "to present a favorable public image of a particular corporation or industry rather than to sell a product"—might be subject to the fairness doctrine if they presented "a meaningful

On the other hand, the Commission found that product and service advertisements which address themselves solely to the desirability of the product "make no meaningful contribution to informing the public on any side of any issue" (*id.*, p. 69a), and that the relationship between such advertisements and any ongoing public debate regarding the consequences of the manufacture or consumption of the product is too remote and inferential to justify imposition of fairness doctrine obligations (*id.*, pp. 69a-71a).

In the Commission's judgment, it would "make little practical sense to view advertisements such as these as presenting a meaningful discussion of a controversial issue of public importance" (*id.*, p. 70a):

> [A]pplication of the fairness doctrine to normal product commercials would, at best, provide the public with only one side of a public controversy. In the cigarette case, for example, the ads run by the industry did not provide the listening public with any information or arguments relevant to the underlying issue of smoking and health. At the time of our ruling, Commission Loevinger suggested that we were not really encouraging a balanced debate but, rather, were simply imposing our view that discouraging smoking was in the public interest.

Adhering to its view of the fairness doctrine as issue-oriented, the Commission was convinced that matching a discussion of issues on one side against inducements to buy a product on the other would not successfully achieve "fairness" and would not be in "keeping with the basic purposes of the fairness doctrine" (*id.*).

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statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance" (Pet. App. B, p. 68a). It stated that the broadcaster would be required to make a judgment as to the applicability of the fairness doctrine to such advertisements (*id.*).

From its own experience, the Commission concluded that its *Banzhaf* doctrine was not subject to limitation within its own terms. As efforts to apply that decision had shown, it was difficult to determine which issues were implicitly addressed by ordinary product and service advertisements. And there was a vast array of products and services whose use had been or could be the subject of controversy.[13] Indeed, under *Banzhaf*, commercials for competing products might be said to have presented contrasting viewpoints, forcing broadcasters to devote their energies to balancing two sets of commercials, neither of which explicitly discussed a public issue or advanced the public's understanding of the issue (*id.*, p. 71a).[14] In any event, the requirement of balancing the

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[13] The comments before the Commission showed that few lines could be drawn. Petitioner proposed application of the doctrine to advertisements for electrical products, automobiles, aspirin and all over-the-counter drugs, among other products. NCCB Comments at 15. Others suggested that the fairness doctrine should apply to all advertisements which "promote the notion that a woman's place is in the home or that 'the best ones are thin and rich,'" which "encourage people to buy on credit," or which "promote the notion that the consumer will get more from a dollar spent at the supermarket or beauty parlor than from a dollar spent on an education bond issue or a dollar donated to the preservation of a local park." *See, e.g.*, Friends of the Earth Comments at 15.

[14] For example, in *Friends of the Earth* v. *FCC*, *supra*, the court of appeals had held that advertisements for large cars and leaded gasoline appeared, under the *Banzhaf* doctrine, to raise health issues arising from the use of these products. The court stated that "pending . . . a reformulation" of *Banzhaf*, there was no basis for distinguishing cigarette advertisements from those for large cars and leaded gasoline. 449 F.2d 1170. As the Commission noted in the *Fairness Report*, however, the advertisements there at issue

> made no attempt at all to discuss the product in the context of the air pollution controversy. If these advertisements presented one point of view on the issue, then, by the same reasoning, the "contrasting" viewpoint must have been similarly presented in ads for low-powered cars (Pet. App. B, p. 71a).

[Footnote continued on page 9]

information contained in the potential array of advertisements for controversial products or services would divert broadcasters' attention from other aspects of their overall obligation to inform the public (*id.*).

The Commission found that the public would be better served by a system that depends on the journalistic discretion of broadcasters to inform the public about controversies surrounding the social utility of advertised products and services than by a Commission effort artificially to force dissemination of information on the basis of a strained interpretation of the content of broadcast advertisements (*id.*, p. 72a):

> [T]he decision to cover these and other matters of similar public concern appropriately lies with individual licensees in the fulfillment of their public trustee responsibilities, and should not grow out of a tortured or distorted application of fairness doctrine principles to announcements in which public issues are not discussed.

The Commission therefore concluded that the application of the fairness doctrine to cigarette commercials had resulted in a "serious departure" from the doctrine's central purpose of developing an informed public opinion (*id.*, p. 69a). Accordingly, it overruled *Banzhaf* (*id.*, p. 71a).

On petitions for review, the court of appeals unanimously affirmed the treatment of product advertisements

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[14] [Continued]

The Commission clearly foresaw the outcome of such an approach:

> The problem with this kind of logic is that it engages both broadcasters and the Commission in the trivial task of "balancing" two sets of commercials which contribute nothing to public understanding of the underlying issue of how to deal with the problem of air pollution (*id.*, p. 71a).

in the *Fairness Report* (Pet. App. A).[15] The court held that the Commission had acted reasonably in concluding that ordinary product commercials do not constitute meaningful discussion of controversial issues of public importance within the meaning of the fairness doctrine; that it had given reasoned consideration to each of the factors pertinent to its change of policy; and that its policy determination concerning the proper scope of the fairness doctrine was supported by "substantial, though not necessarily conclusive, evidence" (Pet. App. A, pp. 27a-31a). The court also agreed with the Commission that equating ordinary product and service advertisements with statements about controversial issues produced a "fundamental asymmetry" in the debate inconsistent with "the objective of presenting all viewpoints on controversial issues of public importance," which is the fundamental purpose of the fairness doctrine (*id.*, p. 29a).

The court below rejected petitioner's contention that the result reached by the Commission was inconsistent with the First Amendment or the Communications Act. It found no merit to petitioner's argument that commercial speech triggers application of the fairness doctrine simply because such speech is constitutionally protected (*id.*, p. 21a). And it found no support for the assertion that Congress had codified in the Communications Act a Commission practice of applying the fairness doctrine to ordinary product advertisements (*id.*, pp. 24a-26a). Finally, the court held that the "public interest standard" of the Act did not inherently require adoption of the *Banzhaf* doctrine, but gave the Commission great discretion in that regard—discretion which it held the Commission had properly exercised in deciding to overrule *Banzhaf* (*id.*, pp. 26a-28a).

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[15] The court remanded a portion of the case to the Commission with instructions that it give further consideration to two suggestions submitted during the comment period concerning aspects of the *Fairness Report* unrelated to the treatment of ordinary product and service advertisements (Pet. App. A, pp. 36a-37a, 41a-42a).

ARGUMENT

Congress left questions of the scope and applicability of the fairness doctrine to the discretion of the Commission, "which it has given the flexibility to experiment with new ideas as changing conditions require." [16] Indeed, this Court has cautioned against freezing any one step taken by the Commission into a constitutional requirement. *See CBS* v. *DNC*, *supra*, 412 U.S. at 132. And it has further noted that Congress' general endorsement of the Commission's fairness principles in the 1959 amendments of the Communications Act did not statutorily mandate the specific details of the fairness doctrine or restrict the Commission's discretion to continue adapting the doctrine to changing conditions. *See Red Lion*, *supra*, 395 U.S. at 384-85.

The portion of the *Fairness Report* challenged by petitioner represents a modification of one particular aspect of the fairness doctrine which the Commission found had been a "serious departure" from the doctrine's goals and history (Pet. App. B, p. 69a). The modification was intended to bring the treatment of ordinary product and service advertisements into harmony with the general principles which underlie the doctrine. The Commission fully evaluated the policy choices before it and articulated a reasoned and rational basis for the change in its policy. Its judgment is entitled to great deference. *CBS* v. *DNC*, *supra*, 412 U.S. at 102.

There is no conflict among the circuits regarding these issues. To the contrary, the only other court which has considered the Commission's action affirmed the agency's decision. In *Public Interest Research Group* v. *FCC*, 522 F.2d 1060 (1st Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), which the Petition fails even to mention, the court

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[16] *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 122 (1973) (*"CBS* v. *DNC"*); *see also Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) (*"Red Lion"*).

of appeals concluded, after reviewing the *Fairness Report*, that

> [u]nless the standard of rationality is to be narrowed to a circle no wider than a court's private judgments, we cannot rule that the Commission's policies here are "arbitrary, capricious, [or] an abuse of discretion". . . . 522 F.2d at 1066.

Faced with these obstacles to further review of this case, petitioner has attempted to cast its disagreement with the Commission's policy judgments in the form of constitutional and statutory arguments. These contentions are plainly insubstantial and were properly rejected by the court of appeals as logically defective and unpersuasive.

In essence, petitioner is simply seeking to have this Court substitute public policy views which petitioner would prefer for those reached by the agency. But only the Commission or Congress can modify agency policy judgments that were lawfully reached. It is not the role of the courts to reweigh the competing policy interests considered by the Commission. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 46 U.S.L.W. 4301, 4311, No. 76-419, decided April 3, 1978.

1. Petitioner contends (Pet. 8-11) that, under this Court's commercial speech decisions, the Commission was required by the First Amendment to attach fairness doctrine obligations to ordinary product advertisements. But, as the court of appeals correctly observed (Pet. App. A, p. 19a), this claim is "based on a fundamental misunderstanding of the relationship between constitutional protection of commercial, or any other type of, speech and the functioning of the fairness doctrine."

The mere fact that material which has been broadcast may be protected by the First Amendment does not give rise to application of the fairness doctrine. The courts

and the Commission regularly have refused to attach fairness doctrine reply obligations to speech that was constitutionally protected but failed to comment meaningfully and directly on a controversial issue of public importance.[17] The commercial speech cases on which petitioner relies[18] have expanded the categories of speech entitled to constitutional protection. But those decisions surely cannot be read as creating a preferred position for commercial speech. And they clearly do not bar the Commission from applying the same fairness doctrine standards of specificity and relevance to such speech as it applies to all other forms of broadcast material in order to determine whether the fairness doctrine should apply.[19]

Moreover, as both the Commission and the court below suggested, the policies of the First Amendment, as defined by this Court in *CBS* v. *DNC*, *supra*, were in fact furthered by the Commission's decision with respect to ordinary product and service advertisements. The Commission's approach assumes that the public is more likely

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[17] *See, e.g., Healey* v. *FCC*, 148 U.S. App. D.C. 409, 460 F.2d 917 (1972); *Green* v. *FCC*, *supra*, 447 F.2d 323; *Polish American Congress* v. *FCC*, 520 F.2d 1248 (7th Cir. 1975), *cert. denied*, 424 U.S. 927 (1976).

[18] *Bigelow* v. *Virginia*, 421 U.S. 809 (1975); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Bates* v. *Bar of Arizona*, 432 U.S. 350 (1977).

[19] Petitioner also contends that the Commission's decision was erroneous because it was based on the expressed view that commercials "are at best a negligible part of any exposition of ideas, and are of . . . slight social value as a step to truth" (Pet. App. B, p. 70a, *quoting from Banzhaf*, *supra*, 405 F.2d at 1101-02). The court of appeals correctly found (Pet. App. A, p. 22a) that this statement, which predated some of this Court's recent commercial speech decisions, did not go to the heart of the Commission's holding, and that "[t]he persuasiveness—or lack thereof—of the Commission's essential finding" that standard product commercials do not constitute meaningful discussion "is not altered by " those recent cases (*id.*).

to obtain meaningful coverage of the widest range of issues through reliance on the journalistic judgment of the broadcaster as to the issues that should be covered and the nature of the coverage.[20] *See CBS* v. *DNC*, *supra*, 412 U.S. at 120, 124-25. The Commission also concluded that the journalistic discretion of the broadcasters would be severely inhibited by a system in which the government searched ordinary product and service advertisements for implicit issues and messages and forced broadcasters to "balance" any such implicit advocacy. *See id.* at 124, 126-27.[21]

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[20] The Commission's decision will not, as petitioner suggests, deny the public information about the underlying issues surrounding the use of controversial products. First, the abandonment of the *Banzhaf* approach will not deprive the public of balanced information and arguments about these issues, because, as the Commission and the court below concluded, ordinary product advertisements do not present meaningful discussions on these questions. Applying the doctrine would thus at best provide the public with only one side of these disputes. Second, as the *Fairness Report* clearly stated, the overruling of *Banzhaf* does not mean that broadcasters will fail in their continuing responsibility to keep the public informed about controversial issues in the community, including disputes about the manufacture and use of advertised products, if those questions become matters of public concern (Pet. App. B, pp. 71a-73a).

[21] Petitioner also presents (Pet. 11-14) a more generalized First Amendment attack on the decision below. This argument essentially runs as follows: The policies underlying the First Amendment favor the presentation of diverse views to the public; attaching fairness doctrine obligations to ordinary product advertisements would further the dissemination of multiple views; therefore, the imposition of fairness doctrine obligations is constitutionally required. The court of appeals properly rejected this argument as a "non-sequitur" (Pet. App. A, p. 21a):

> While an ultimate function of both the first amendment and the fairness doctrine may be to encourage the dissemination of viewpoints and information, this does not mean that the two principles cover exactly the same ground. There is an obvious difference between the standard employed by the Commission for determining whether the fairness doctrine applies to advertisements . . . and the holding in *Virginia State Board* that advertising is protected by the first amendment because it repre-

2. As previously noted, Congress has entrusted the Commission with broad discretion to shape the fairness doctrine. It is frivolous to assert (Pet. 14-18) that in amending the equal opportunities provisions of Section 315 of the Communications Act in 1959, Congress codified a prior Commission policy of attaching fairness doctrine obligations to ordinary product advertisements.

While the 1959 amendments generally sanctioned the Commission's fairness principles, "specific recognition in statutory form" is necessary to demonstrate that the amendments ratified and codified a particular aspect of prior Commission policy. *Red Lion, supra*, 395 U.S. at 380-82. Petitioner has not pointed to anything in the language or legislative history of the 1959 amendments which suggests that Congress even considered, much less approved, any purported Commission policy of applying the fairness doctrine to product commercials.[22]

Petitioner's argument that such a policy even existed is based solely upon a dictum in an early Commission case. *See Sam Morris*, 11 F.C.C. 197 (1946).[23] As the court below found in *Banzhaf*, and reaffirmed in this case (Pet. App. A, p. 26a n.51), *Sam Morris* did not establish a policy that ordinary product advertisements were subject to the fairness doctrine:

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sents dissemination of valuable information important to the functioning of a free enterprise system (footnote omitted).

[22] Petitioner erroneously relies (Pet. 16) on the failure of later Congresses to overrule *Banzhaf* as evidence that such a doctrine was codified in 1959. But as the Court noted in a similar context in *Red Lion*, "unsuccessful attempts at legislation are not the best of guides to legislative intent." 395 U.S. at 382 n.11. *Accord, Public Interest Research Group* v. *FCC, supra*, 522 F.2d at 1066-67; *see also Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 241-42 (1970); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

[23] Although *Sam Morris* antedated the first comprehensive formulation of the fairness doctrine, the *Editorializing Report* does not refer to the existence of the policy petitioner would read into that case.

> The case has not been followed in the twenty years since it was decided. It is not in any event a clear precedent for a ruling which instructs stations to broadcast opposition to their paid commercials regardless of whether opponents buy—or even request—such broadcast time. *Banzhaf*, 405 F.2d at 1092.

Therefore, the court of appeals correctly held that the 1959 amendments could not be construed to have codified the approach ultimately adopted in *Banzhaf* (Pet. App. A, p. 26a). *See CBS* v. *DNC*, *supra*, 412 U.S. at 113 n.11.

3. Petitioner further contends that the Commission improperly narrowed the reach of the fairness doctrine, in a fashion inconsistent with the public interest standard of the Act. It argues that commercial speech is the only form of speech in which the Commission requires discussion of "underlying issues" before reply obligations will attach.[24] That contention mischaracterizes the Commission's actual conclusion. The agency found that in order to provide meaningful discussion of controversial issues of public importance, the fairness doctrine analysis must focus on what are the real issues in dispute, and the debate must not be skewed by the fruit-

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[24] Petitioner also contends (Pet. 18) that the "public interest standard" of the Act requires that reply obligations attach to commercials for products and services which pose a risk to the "public health." But this Court has consistently held that the use of the term "public interest" in a regulatory statute is not a "broad license to promote the general welfare"; rather, the words "take [their] meaning from the purposes of the regulatory legislation." *NAACP* v. *FPC*, 425 U.S. 662, 669 (1976). Here, the Court has already found that the Communications Act does not impose specific fairness doctrine obligations on either broadcasters or the Commission. *CBS* v. *DNC*, *supra*, 412 U.S. at 122. As noted above, Congress determined that the better way to serve the public was to leave the question of the scope of the fairness doctrine to the discretion of the Commission. Furthermore, serious First Amendment questions would be raised by a system in which the government could dictate the programming material to be broadcast by invocation of a standard as broad and vague as "the public interest" or "public health." *See Banzhaf*, *supra*, 405 F.2d at 1099.

less task of attempting to balance sets of commercials which do not directly address those issues or enhance the public's understanding. As the Court below observed, the Commission's judgment is

> more aptly characterized as being based on the view that the ultimate controversial issue of public importance is not the desirability of the product but the issues raised in the debate over desirability. Merely advocating the use of a product does not present information or involve discussion of these underlying issues . . . (Pet. App. A, pp. 28a-29a).

As so defined, it is clear from the Commission's opinion, and the affirmance of the court below, that the actual effect of the Commission's action was to apply to commercial speech, for fairness doctrine purposes, the same tests of relevance and specificity that the Commission applies to all other broadcast speech.

In sum, this case presents no substantial issues or questions requiring the attention of the Court. There is no conflict among the courts of appeals. The Commission's decision and the opinion of the court below are fully consistent with the decisions of this Court. To the extent that petitioner believes that the policy judgments made by the Commission are wrong and should be changed, this Court has recently made clear that such policy questions are "appropriately resolved in Congress" and in the agencies granted authority to make those judgments; they "are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action." *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, *supra*, 46 U.S.L.W. at 4311 (emphasis in original).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

J. ROGER WOLLENBERG
JOEL ROSENBLOOM
STEPHEN A. WEISWASSER
JOHN F. COONEY

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Respondent CBS Inc.

Of Counsel:

RALPH E. GOLDBERG
ALLEN Y. SHAKLAN
CBS Inc.
51 West 52 Street
New York, New York 10019

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